FILE COPY

Office - Supreme Court, U. S.
FILED
DEC 6 1946
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

536

October Term, 1946

CHARLES A. KOZA, JOHN A. ANDERSON and INVINCIBLE TOOL CO., INC.,

Petitioners,

vs.

CHARLES DREXLER and CHARLES DREXLER CO., INC.,

Respondents.

PETITION FOR REHEARING AND BRIEF IN SUPPORT THEREOF ON THE ORIGINAL PETITION FOR WRIT OF CERTIORARI TO THE U. S. CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Comes now your Petitioners, Charles A. Koza, John A. Anderson and Invincible Tool Co. and pray for a rehearing in the above entitled case.

Argument

Petitioners represent that they have filed a printed Petition for a Writ of Certiorari and this Petition has been denied on

or about November 12, 1946. As a reason for this Petition for a rehearing, your Petitioners say as follows:

In their printed Petition, Petitioners have assigned nine errors. These errors have been set forth on pages 15 to 20 inclusive of the printed Petition.

In the second error assigned, Petitioners have pointed out that Drexler put in evidence sixteen prior patents that were not material, and the introduction of which was objected to as irrelevant and immaterial on page 64a. The objection was overruled at 65a. The sixteen patents are listed on page 66a. On introducing these patents, counsel for Drexler on page 64a said as follows:

> "I would like to offer in evidence a volume of patents illustrative of the prior (61) state of the art. My purpose for doing that—and it includes the patents cited against the two Drexler and Koza patents in the prosecution of those cases; and it also shows that an *Angle tool drill*—or an *angle tool* with the bevel gears was a very common tool in the prior art, and therefore was brought to the Charles Drexler Company by Mr. Koza was—so far as showing bevel gear *angle tools*—common knowledge to everybody." (Italics ours.)

These sixteen patents were offered in evidence for the purpose of belittling the importance of the confidential disclosure of an Angle Drill made by Koza to Drexler in December, 1937. Drexler admitted that he had never seen an angle drill before Koza's disclosure in December, 1937. If these patents showed drills or *Angle Tool Drills* as asserted by counsel for Drexler, they would have had a better standing as evidence for the purpose of rebutting the importance of Koza's disclosure to Drexler. These patents showed *Wrenches* or Screw Drivers, but counsel for Drexler did not say so. He used the words: "Angle Tool Drill" followed by the words "Angle Tool" and "Angle Tools". As so used the words "Angle Tool" and "Angle Tools" meant the same as *Angle Tool Drill*.

It is a well-known rule of construction that where general words follow specific words in a paragraph, they relate back to and are limited in their meaning to those specific words. Therefore your attorney understood counsel for Drexler to mean that all these patents showed "Angle Tool Drills" and it is believed that the District Court understood him to mean that as well. Otherwise the District Court would not have cited two of these patent which show "Angle Wrenches" in Finding 6. No evidence was taken to explain or adapt these patents to the case.

These patents do not show "Angle Tool Drills". They all show *Angle Wrenches* or *Angle Screw Drivers* and the patents all show that they were operated by hand which means that they must have been operated intermittently and at very low speed while angle tool drills must be operated by power at high speed; namely at from 1700 to 17000 R. P. M. (See page 16 of the Petition and Brief.)

In his original Petition and Brief before this Honorable Court, Petitioner for the first time showed at pages 16 and 21 that these 16 patents did not show "Angle Tool drills", and he showed for the first time that they were hand operated.

The District Court must have been misled into believing that they showed *Angle Tool Drills* or it would never have cited two of these patents in its Finding 6 (See page 155a).

It is also believed that the Court of Appeals must have been misled to the same extent because Koza's attorney did not assert or argue otherwise in Koza's Brief before the Court of Appeals, which brief was prepared at Pittsburgh.

It was not until Koza's brief was in the course of preparation for this Honorable Court in July 1946 that this error and deception was first found by your attorney at Rochester.

Possibly your attorney should have informed this Honorable Court that this error was not called to the attention of either of the Lower Courts, but your attorney did fail to do so and your attorney now submits that both of the lower courts ruled in this case as though these patents were properly cited as prior art, when in fact they were not properly cited as prior art, and they had no bearing on the question of whether Koza made a confidential disclosure to Drexler.

The citations on the question of non analogous art are given at the bottom of page 16 of the Petition and Brief.

The loose statements of counsel for Drexler at page 64a which are above set forth, misled your attorney, and probably misled the Lower Courts. Your attorney at pages 29 to 32 inclusive of the Petition and Brief undertook to show how irresponsible Drexler's attorney has been in a similar case, involving the origin of or the stealing of an invention, and if Koza is the inventor here, Drexler's attorney is repeating the same conduct in this case and Petitioner submits that such practice should not go without being inquired into and rebuked in this Honorable Court.

On pages 17 and 22 of the Petition, your attorney set forth the third error assigned under the heading AMORTIZE. This error was not presented either in the District Court or the Court of Appeals of the Third Circuit by Koza because your attorney did not notice this error until the Petition and Brief was prepared at Rochester for this Honorable Court. It is believed that neither the District Court nor the Court of Appeals of the Third Circuit understood the very serious admission made by Drexler in his testimony at page 125a. Attention was first called to it in Petitioner's Brief to this

Court. On page 25 of the Petition and Brief, Koza presented three paragraphs as follows:

> "If on January 24, 1938, Drexler intended to apply for and take out the patent in his own name, then the charge against Koza of $250.00 to amortize the cost of the tools was dishonest because it would charge Koza for the cost of the tools which Drexler would own, and which would remain in the possession of Drexler and which Koza could not use without Drexler's consent.
>
> If on January 24, 1938, Drexler understood that Koza was the inventor and would apply for the patent, then the charge of $250.00 for amortizing the cost of the tools was proper, but in that case, it was dishonest for Drexler later to file the application and take out the patent in his own name. Either way that this item of the evidence is looked at, it shows that Drexler is open to suspicion or is dishonest. What then becomes of Drexler's credibility?"

Fearing that this Honorable Court may have thought that the second and third errors were submitted to and considered by the Lower Courts, your attorney takes this opportunity to say that he believes that those errors were not and could not have been considered by either of the lower courts because they were not known to your attorney at Rochester prior to July, 1946 and were therefore not called to the attention of either of the Lower Courts.

The unlooked for admission on page 125a of Drexler's intention to charge Koza with the cost of the forging tools and amortize the cost of them should be regarded as on a par with newly discovered evidence or nearly so.

If this case cannot be taken up by the Supreme Court, is there any way in which it can be sent back to either of the Lower Courts for further consideration on the important facts that have been first presented to this Honorable Court?

Petitioner again calls attention to the fact that in 1938, 1939 and 1940 Koza was poverty stricken. Koza said he was living from hand to mouth, (page 87a) and (page 121a). See page 70 of Petition and Brief, and page 56a where Drexler testified that he could not get any good financial report on Koza, yet both the District Court and the Court of Appeals of the Third Circuit holds Koza to a responsibility or diligence that could be borne only by a party that was amply financed.

Near the bottom of page 162a, the District Court asserted:

> "The burden of an Interference proceeding could not have been heavy."

Your attorney knows from experience that this statement is untrue. He has tried many Interference cases, nearly all of which has cost his client much more than $1000.00. Koza believes that this Honorable Court cannot be without an opinion on this subject of the cost of litigating an Interference in the Patent Office, which is like a suit in equity tried on depositions, which is aggravated by the fact, so far as Koza's poverty is concerned, that Koza could not litigate the Interference Proceeding Informa Pauperis as heretofore pointed out at pages 33 and 72 of the Petition and brief.

Therefore your attorney asserts that the burden of an Interference Proceeding in 1939 and 1940 on Koza would have been heavy, very heavy and very expensive and Koza would have had to bear the burden at a time when he was poverty stricken and could not raise the money. Petitioner submits that the District Court exceeded the bounds of propriety in making this statement and asserts that this is but one of a number of errors made by the District Court of which Koza complained and which were ignored by or approved by the Court of Appeals in the Third Circuit.

The fact or inference from the ruling of the District Court is that Drexler filed his application promptly and acted promptly in claiming the invention in 1938 and is therefore the inventor, paying no attention to the fact that Drexler was amply financed in 1938, and that Koza was financially embarrassed and could do nothing in the critical year in the Patent Office; namely, in the year before February 21, 1940, because he could not pay his attorney for the cost of going through with an Interference Proceeding, and he is therefore not to be considered the inventor in this Infringement suit in 1946, from which it must appear that Drexler's money in 1938 and 1939 has won this Infringement suit in 1946, in spite of the two presumptions in Koza's favor set forth in the 5th and 6th assignments of errors, which presumptions Koza believes should be recognized by this Honorable Court and applied to this case and should be made of general application in similar patent cases. These assignments or presumptions are:

First: That Koza being the man who was experienced in the art of angle drills is presumed to be the inventor as against Drexler who admits he had never seen an angle drill before Koza's disclosure in 1937.

Second: That Drexler being the proprietor of a job shop and Koza being his customer, the presumption is that the invention originated with the customer and not with the proprietor of the job shop.

(See the 5th and 6th assignments of errors, pages 50 and 66—of the Petition and Brief.)

If Koza's poverty prevented him from acting before February 21, 1940, then Drexler's money in 1938 has won this infringement suit.

Koza submits that the decision of the Lower Courts is so unjudicial and is so lacking in equity that it should be reviewed by this Court. He therefore petitions for a rehearing in accordance with Rule 33 and your attroney hereby certifies that this Petition for a rehearing is presented in good faith and not for delay and submits, too, that this amply appears on the subject matter of this Petition for a rehearing.

Therefore it is submitted that a rehearing should be granted on the original petition and that the original Petition for a writ of certiorari should be granted.

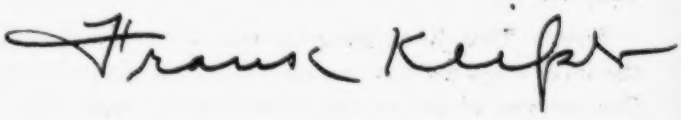
Rochester, New York

November 27, 1946

Respectfully submitted,

FRANK KEIPER

Attorney for Petitioner



Daily Record Company,
Rochester, New York.